Supreme Court, U.S.
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No. 88-1631

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

HENRY W. CUMMINGS

PETITIONER

v.

ACF INDUSTRIES ET AL

RESPONDENTS

PETITIONER'S REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY W. CUMMINGS
3313 W. Adams Street
St. Charles,MO 63301
(314) 946-0076
(314) 232-6369
Attorney for Petitioner

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A. TABLE OF THE AUTHORITIES

UNITED STATES SUPREME COURT RULE 17

FEDERAL RULE CIVIL PROCEDURE 8

FEDERAL RULE OF CIVIL PROCEDURE 15

MISSOURI SUPREME COURT RULE 55.05

MISSOURI SUPREME COURT RULE 55.33

Bishop v. Wood 426 U.S. 341

Board of Reagents v. Roth 408 U.S. 564

Bodie v. Conn. 401 U.S. 371 (1971)

Cleveland Board of Ed. v. Loudermill 470 U.S. 532 (1985)

Conley v. Gibson 355 U.S. (1957)

Foman v. Davis 371 U.S. (1962)

Little v. Streater 452 U.S. (1981)

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1. While respondents state that none of the questions presented by the petitioner are covered by Rule 17 of the court, respondents overlook the plain language of Rule 17 which states "The following while neither controlling or fully measuring the court's discretion indicate the character of the reasons that will be considered."(Emphasis added). It is thus

apparent that sub-paragraphs (a)-(c) of Rule 17 are not controlling as to whether or not the petition is in compliance with Rule 17.

2. Moreover, section (c) of Rule 17 is directed to a situation where "a state court has decided a federal question in a way in conflict with applicable decisions of this Court."

3. Petitioner has been denied due process of law and equal protection of the laws under the applicable Rules of Civil Procedure. See Cleveland Board of Ed. v. Loudermill 470 U.S. 532 (1985); Bishop v. Wood 426 U.S. 341; Board of Reagents v. Roth 408 U.S. 564; Bodie v. Conn. 401 U.S. 371 (1971); Little v. Streater 452 U.S. (1981).

4. Concerning petitioner's question #2 concerning whether or not plaintiff's original petition, failed to state a claim upon which relief could be granted; Missouri Supreme Court Rule 55.05 is very similar to Federal Rule of Civil Procedure 8 and involves the same basic principal of federal law.

5. As stated by this court in Conley v.

Gibson, 355 US 41, 47, 78 S.Ct 99, 2 L ed2d 80,(1957), "all the rules require is a short, plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." It is believed that a brief review by the court of petitioner's original complaint will reveal that this test was met concerning allegations of two breaches of contract in Pars. 30, 32, 34, 36, 39, 41, and 43 in the original complaint. It therefore was clearly wrong and contrary to Conley v. Gibson for the trial court to dismiss the complaint for failure to state a claim upon which relief could be granted and for the Missouri Court of Appeals to affirm this dismissal. Petitioner had no other choice but to move to transfer to the MO Supreme Court, and when that motion was denied, petition to this court for due process and equal protection of the laws under applicable decisions of this court.

6. Concerning petitioner's point #1,

Missouri Supreme Court Rule 55.33 is very similar to Federal Rule of Civil Procedure 15 which provides that a party may amend his pleading by leave of court and leave shall be freely given when justice so requires.

7. In Foman v. Davis 371 U.S. 78, 83 SCt 227, 9 L ed2d 222 (1962); this court stated the philosophy that amendments of the pleadings are to be freely granted even after a complaint has been dismissed. The court said "Rule 15a declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. If the underlying facts or circumstances relied on by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits"---"outright refusual to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the federal rules". This is exactly what happened to plaintiff's petition. The claim

was dismissed as failing to state a claim upon which relief could be granted, and leave to file an amended complaint was denied.

8. Briefly the changes and additions in the amended petition were to place the two breach of contract allegations in separate counts, which was requested by the Trial Court (Count I Pars. 7-45; Count II Pars. 46-59); the addition of the negotiation allegations in Pars. 24-30 and Exhibits 2 & 3; the allegations in paragraph 35 and 38 of the long term agreement for plaintiff to do the intellectual property work for ACF; the allegation of ACF's negligence in paragraph 41; the allegations of mutual consideration in Count II, Paragraph 48; specific allegations of petitioner's better background in Par. 54 including Law Review in evening law school and experience at the U. S. Patent Office; and the allegation of outrageous conduct in Par. 59.

9. Leave should have granted by the trial court to file an amended complaint since the case was not in the discovery stage and was not

set for trial. Defendants would not have been unfairly prejudiced by such an amended complaint. This was a clear violation of the doctrine sent down by this court in Foman v. Davis.

10. The reason petitioner is before this court is because of the failure of the Missouri Trial Court and Missouri Court of Appeals to follow these well-known and fundamental principles, which is a denial of due process and equal protection of the laws.

11. On this basis alone, it is believed that it is appropriate for this court to summarily reverse (Rule 23.1) the judgment of the Missouri Court of Appeals and hold that Petitioner's original claim stated a claim upon which relief could be granted, and that petitioner had a right to file an amended complaint with the additional allegations and exhibits referred to above. This will take little of the court's time and yet will correct clear injustice and abuse in lower courts. Respondents have not contended otherwise in their brief.

12. Alternatively, Court should grant certiorari and set the case down for briefing and oral argument wherein the merits of plaintiff's petition will be even more apparent to this court.

13. Sub-section (a) of Rule 17 describe a situation when a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower court as to call for an exercise for this court's power of supervision.

14. With the phrase in the first paragraph of Rule 17, "while neither controlling nor fully measuring the court's discretion," it is believed that sub-paragraph (a) should be read in coniunction with sub-paragraph (c). The supervisory authority should equally apply to a state court which has so far departed from the accepted and usual course of traditional proceedings and/or has sanctioned such a departure by a lower court as to warrant this Court's supervision.

15. It is believed that when Rule 17 is read in its entirety and is compared with the facts which the present case presents, it is appropriate that this court grant certiorari and summarily reverse the Missouri Court of Appeals under its supervisory authority. Alternatively the court should grant certiorari and set the case down for brief and oral arguments so that the court may more fully understand the manner in which the Trial Court and the Missouri Court of Appeals have departed from the accepted and usual course of judicial proceedings, and denied petitioner due process and equal protection of the laws.

Respectfully submitted,

Henry W. Cummings

Henry W. Cummings
Attorney for Petitioner

It is certified that three copies of this REPLY BRIEF IN OPPOSITION have been mailed this 14th day of May 1989 to Mann, Poger, Wittner & Hereford, P. C. 7711 Carondelet Ste. 400 St. Louis, MO 63105 and to Ms. Peggy Good, Mr. Gary Reger, Dr. David Sutliff at 3301 Rider

Trail South Bridgeton, MO 63045 and to Mr. James C. O'Hara at 9889 Copper St. Louis, MO 63146.

Henry W. Cummings

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